Filed 11/2/09 In re U.B. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re U.B., a Person Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. E.O., Defendant and Appellant.	F057474 (Super. Ct. No. JJV61112) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

S. Lynne Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Channone Smith-Sheller, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Cornell, Acting P.J., Gomes, J. and Kane, J.

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E.O. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) as to her son, U.B.[1] She contends the court committed prejudicial error because there is no evidence anyone asked the child's alleged father whether he had Indian heritage for purposes of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

Respondent Tulare County Health and Human Service Agency (agency) initiated the underlying dependency proceedings for six-month-old U.B. and his older half-sister because mother's substance abuse rendered her unable to provide the children with adequate care and supervision and, in U.B.'s case, his alleged father had not made any provision for the child's support.

At a September 2006 detention hearing, the Tulare County Superior Court inquired of mother about U.B.'s paternity. She stated M.V. was the child's father. She was not married to M.V. at either the time of the child's conception or birth. She did not live with a man at either of those times. No man's name was on the child's birth certificate. No man had acknowledged being the father of the child. Since the child's birth, M.V. had seen the child "maybe five times at the most." Mother initiated these contacts by calling M.V. Mother did not know M.V.'s current whereabouts. The court in turn found M.V. to be the child's alleged father.

During the detention hearing, mother also denied either being a member of or eligible for membership with any Native American Indian tribe. This led the court to find there was insufficient reason to believe that ICWA was applicable to the case.

The court subsequently exercised its dependency jurisdiction over the children and later still adjudged them dependents and removed them from parental custody. In U.B.'s

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

case, the court ordered family reunification services for the mother, but not the child's alleged father, due to his lack of presumed father status (§ 361.5, subd. (a)). The man's whereabouts also remained unknown.

Despite 12 months of reasonable services, mother failed to reunify with U.B. Midway through the reunification period, the alleged father M.V. was discovered in a neighboring county's jail. It was unknown when he was arrested. Although the alleged father was not present in court, the court appointed an attorney on the man's behalf. Shortly thereafter, the agency and the man's attorney reported back to the court that M.V. was incarcerated on a parole violation. His attorney had no argument to make regarding services since M.V. was an alleged father.

In October 2007, the court terminated mother's reunification services as to U.B. By that time, M.V. was incarcerated in the state prison at Wasco. His release date was in 2014. His attorney had no evidence or argument to present at the hearing.

In May 2008, the court selected legal guardianship as its permanent plan for U.B. with the understanding that U.B.'s adoption remained the court's goal. The child had suffered a traumatic brain injury soon after he entered foster care. As of the May 2008 hearing, U.B. was in a new placement with one of his professional caregivers. The caregiver and her spouse were committed to providing U.B. a permanent plan but preferred to consider adoption at a later date. The court named the current caregivers as U.B.'s legal guardians.

Meanwhile, the court had issued a transport order for the alleged father to attend the May 2008 hearing. However, the court received a response that the man was now in custody in Arizona. His attorney had no evidence or argument to present.

Six months later, the court set a new section 366.26 hearing for U.B. based on the legal guardians' desire to adopt the child. The alleged father's attorney submitted the matter without any argument.

Attached to a proof of service for the new section 366.26 hearing was a form entitled "ACKNOWLEDGMENT OF RECEIPT OF NOTICE OF HEARING STATEMENT OF PARENT" and completed by M.V. on January 14, 2009. In addition to acknowledging his receipt of notice, M.V. also checked two of five printed statements in the form and hand wrote additional comments. The statements he checked revealed he wanted to contest the agency's recommendation to terminate parental rights. Relevant to this appeal, he did not check the statement to claim he was the father of U.B. In the comment portion, nevertheless, he referred to U.B. as "my son" and wanted a chance to be a good and responsible father.

Approximately two months later, the court conducted the section 366.26 hearing for U.B. In the meanwhile, the agency had prepared a report in which it recommended the court find U.B. likely to be adopted and order parental rights terminated. M.V. was not present at the hearing but his attorney was. The attorney had not sought a transport order for M.V.'s presence apparently due to his out-of-state incarceration.

The court, having read and considered the agency's report, asked each party's attorney if he or she had any further evidence to present. None did. M.V.'s attorney in particular replied "submitted" when asked. In addition, none of the attorneys had any argument to make. The court in turn found the child was likely to be adopted and terminated rights.

DISCUSSION

Mother argues there is no evidence that any inquiry was ever made of the alleged father, M.V., regarding whether he had any Indian heritage. Absent such evidence, she contends that the court and the agency violated their duty to inquire of him as one of U.B.'s parents pursuant to section 224.3 and an implementing rule of court, California Rules of Court, 5.481(a)(3). Therefore, in mother's view, the order terminating her rights must be reversed.

We will assume for the sake of argument that mother has standing to raise this claim and has not forfeited it by her failure to ever raise it either in the trial court or by way of an earlier appeal to this court. However, as discussed below, her claim does not warrant reversal.

The juvenile court and the county welfare department do have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. (§ 224.3, subd. (a).) The inquiry is for "information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's *biological* parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1), italics added.) The reference to a biological parent/child relationship is based on ICWA's definition of parent which is:

> "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." (25 U.S.C. § 1903(9); see also Welf. & Inst. Code, § 224.1, subd. (b) [which defines "parent" as provided in ICWA].)

In this case, M.V. was at most U.B.'s alleged father. An alleged father is a man who may be the father, but who has not yet established himself as either a biological father or a presumed father. (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.) There is no evidence in the record that M.V. was the child's biological or adoptive parent. Although M.V. had the benefit of court-appointed counsel, he never attempted to establish himself as the child's biological father, or for that matter, anything other than an alleged father. Mother ignores the statutory references to a biological or adoptive relationship in her opening brief and nonetheless claims the agency should have inquired of M.V. Even assuming the duty to make an ICWA inquiry includes asking an alleged father about his heritage (cf. *In re E.G.* (2009) 170 Cal.App.4th 1530, 1532-1533), there could be no prejudicial error here given there was no showing M.V. shared the requisite

biological or adoptive relationship, under ICWA, with U.B. Thus, ICWA could not apply.

In her reply brief, mother modifies her argument to contend M.V. acknowledged his paternity in the form he completed in January 2009 because he referred to U.B. in the comment section as "my son." At that point, in mother's view, M.V. was the child's parent for ICWA purposes and the agency should have made a record of inquiring about M.V.'s heritage. Assuming arguendo mother is entitled to our review of this argument raised for the first time in her reply brief (cf. *Monk v. Ehret* (1923) 192 Cal. 186, 190), ICWA still could not apply in U.B.'s dependency.

Mother cites no authority and we know of none to support her claim that a man's simple reference to a child as "my son" constitutes an acknowledgement of paternity for purposes of ICWA. Indeed, mother overlooks *In re Daniel M.* (2003) 110 Cal.App.4th 703, an opinion which persuasively discredits her claim.

Although ICWA expressly excludes from its definition of "parent" the unwed father where paternity has not been acknowledged or established (25 U.S.C. § 1903(9)), ICWA does not provide a standard for the acknowledgment or establishment of paternity. Consequently, courts have resolved the issue under state law. (*In re Daniel M., supra,* 110 Cal.App.4th at p. 708, citing *In the Matter of the Adoption of a Child of Indian Heritage* (1988) 111 N.J. 155, 176; *Yavapai-Apache Tribe v. Mejia* (Tex.Ct.App. 1995) 906 S.W.2d 152, 171–173.)

> "Courts have held an unwed father must take some official action, such as filing a voluntary declaration of paternity, establishing paternity in legal proceedings, or petitioning to have his name placed on the child's birth certificate. (*Adoption of Baby Girl B.* (Okla.Ct.App. 2003) 67 P.3d 359, 366; *In the Matter of Adoption of a Child of Indian Heritage, supra,* 111 N.J. at p. 178 [543 A.2d at p. 936]; *Yavapai-Apache Tribe v. Mejia, supra,* 906 S.W.2d at pp. 172–173.) Similarly, in California an alleged father may acknowledge or establish paternity by voluntarily signing a declaration of paternity at the time of the child's birth, for filing with the birth certificate (Fam. Code, § 7571, subd. (a)), or through blood testing (Fam. Code,

§ 7551)." (*In re Daniel M.*, *supra*, 110 Cal.App.4th at pp. 708-709, fn. omitted.)

Here, there is no evidence that M.V. ever took any such official action to acknowledge or establish the child's paternity. On the other hand, there was mother's earlier testimony that no man's name was on the child's birth certificate and no man had acknowledged being the father of the child. We also note that once the alleged father had notice of the underlying dependency proceedings as well as the benefit of counsel, he made no effort to elevate his paternity status to at least that of a biological parent. There was no request for blood tests and no belated effort to file a voluntary declaration of paternity. We therefore reject mother's claim that the alleged father satisfactorily acknowledged the child's paternity for purposes of ICWA. Consequently, we conclude any inquiry error in this case was harmless under the circumstances.

DISPOSITION

The order terminating parental rights is affirmed.